No. 86-1287

In The

Supreme Court of the United States

October Term, 1986

RAYMOND C. AHLBERG, *et al.*,

Petitioners,

vs.

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONERS

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As recognized by the agency, petitioners complain of two distinct violations of civil service regulations. The first (addressed in section 2a of the opposition memorandum), occurred on October 1, 1981, when they were separated in violation of the regulation which required that they be transferred to the

Department of Health and Human Services.[1] The second (addressed in section 2b of the opposition memorandum) occurred when the Merit Systems Protection Board used an ad hoc method devised by the agency itself, rather than the procedures in the reduction in force regulations, to determine which former CSA employees would have been retained had a reduction in force been conducted concurrent with the transfer of function.

As the agency stressed, in *Menoken v. Dept. of Health and Human Services,* No. 86-93 (Oct. 14, 1986), the pro se petitioner emphasized her "fact-bound" contention that "she was entitled to one of several positions in OCS." *Menoken,* Memorandum for Respondent in Opposition at 3. Here, in contrast, no facts are in dispute; there is not even a dispute as to how to apply the regulations to the facts. This Court is asked to reverse an express judicial approval of the conceded violation of regulations by agencies bound by them.

1. The regulation upon which the first issue is based governs the case when the disparity between the number of employees entitled to transfer and the number needed at the receiving agency is so great that a reduction in force will be needed. Under those conditions, according to the regulation, the employees are first to be transferred and then the gaining agency may carry out any necessary reduction in force:

> If the losing competitive area identifies and

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1. Petitioners argue that their separations in violation of this regulation were null and void. There are only 29 petitioners (plus approximately 20 other former CSA employees whose cases are still pending before the MSPB or the court of appeals. It is not at all clear why a ruling in the present petitioners' favor would mean that they "and more than 700 individuals whose jobs no longer exist should receive a back pay award from the Treasury for a five-year period." (Opp. 6). It is not even clear where the agency got its five year figure from.

> transfers more employees than the gaining competitive area needs to carry on the function, the gaining competitive area may follow reduction-in-force procedures to relieve the surplus. Competing employees identified by the losing competitive area have a right to:
>
> (a) transfer to the gaining competitive area before it conducts a reduction in force. . . .

351 FPM § 5-3(d)(2) (emphasis added).

The error as to which all the petitioners seek remedy is that, as is undisputed, instead of a transfer followed by reduction in force determination of who would no longer be necessary, there was a simple wholesale separation of every single employee.

Two reasons are suggested to justify this. The Federal Circuit cites the fact that there were more employees entitled to transfer than there were positions needed at HHS (Pet. App. 263a-264a); this fact, however, merely meant that the regulation applied, not that it need not be complied with. When the Federal Circuit cites the very facts which make the regulation applicable, as meaning that separations in violation of it are not nullities, it has rendered the regulation non-binding. The agency's opposition memorandum does not even claim that treating the transfer regulation as unenforceable is consistent with *United States v. Nixon,* 418 U.S. 683 (1974); *Morton v. Ruiz,* 415 U.S. 199 (1974); *Vitarelli v. Seaton,* 359 U.S. 535 (1959); *Service v. Dulles,* 354 U.S. 363 (1957); and *United States ex rel. Accardi v. Shaugnessy,* 347 U.S. 260 (1954).[2]

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2. The agency's memorandum also ignores the problems that would be caused by treating the regulations as enforceable, but only through pre-violation injunctive relief. *See* our petition at 13-4.

The agency suggests an alternative reason for condoning the violation of the transfer regulation: that the government's failure to properly maintain its personnel records would have created impediments to carrying out a proper reduction in force immediately after the transfer of function (Opp. 5). The cases we rely on, however, do not allow the government to avoid compliance with its own regulations merely by creating conditions which make compliance more difficult or expensive than it otherwise would be.

2. The second violation complained of came in the proceedings before the Merit Systems Protection Board. The regulation quoted above goes on to specify that the reduction in force which often accompanies a transfer of function[3] must be accomplished under the established reduction in force procedures:

> Competing employees identified by the losing competitive area have a right to:
>
> * * *
>
> (b) compete among themselves and employees in the gaining competitive area for retention under the *OPM's reduction-in-force regulations.*

351 FPM § 5-3(d)(2) (emphasis added).

Several of the MSPB regional offices, eventually with the approval of the full board and of the Federal Circuit, interpreted the consolidated decisions as holding that remedy should be given

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3. As noted in our petition, at least one transfer of function with concomitant reduction in staffing is currently in the works. Petition at 10-11.

those who would have survived a reduction in force concurrent with the transfer of function, but that the reduction in force regulations, 5 C.F.R. Part 351, should be ignored in making these determinations — that, instead, a master retention list system devised by the agency itself should be used.

The agency apparently agrees that as a general matter the cases we rely on — *United States v. Nixon*, 418 U.S. 683 (1974); *Morton v. Ruiz*, 415 U.S. 199 (1974); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); and *United States ex rel. Accardi v. Shaugnessy*, 347 U.S. 260 (1954) — hold that when there is a question whether particular regulations were complied with the adjudicator compares the facts to the requirements of those regulations, not to a set of procedures which concededly violate those regulations. Thus, one issue in *Service* was whether, in fact, "petitioner's discharge was consistent with the Department's regulations." 354 U.S. at 382. The Court resolved that question by reference to those regulations, not to ad hoc procedures established by the agency as a reasonable method for dealing with the situation. 354 U.S. at 382-9.

Here, there is not even a claim that the regulations were followed. The agency does suggest two reasons why a conflict between the Federal Circuit's decision and the cases we rely on should not be resolved.

First, the agency denies that the consolidated decision explicitly found that reconstruction of a proper reduction in force was possible (Opp. 6). Even were the agency correct, the fact would remain that the decision nowhere says that reconstruction is not possible, or gives any other reason for not relying on the regulations.

In any event, the agency's interpretation of the disputed passages in the Federal Circuit opinion is untenable. After reciting

that the agency had created the master retention list system in order to place former CSA employees in the belief that the retention rights under the regulations could not be calculated (Pet. App. 246a-247a), the Federal Circuit used language which can be interpreted only as a rejection of the agency's excuse:

> [T]he Board rejected the Department's contention that the retention rights of individual employees who had not been appointed to positions with the Office of Community Services could not be determined.

(Pet. App. 267a).

Indeed, if the Federal Circuit intended to find that reconstruction of the records was impossible rather than possible, it would not have stressed the expert witness's testimony that

> the necessary information could be obtained through a procedure known as a "desk audit," and that one "could conduct a regular desk audit after an agency has been abolished."

(Pet. App. 268a).

The agency attempts to explain these passsages as holding only that it is possible, after the fact, to determine relative retention rights under the master retention list system (Opp. 6). But if the court and the board were endorsing the system the agency had already used, the court would not cite the board as rejecting the agency's position. Similarly, since the master list system was created expressly to avoid the necessity of correcting the personnel records in order to comply with the regulations, the court's stress on the ability to correct the records through post-abolition desk

audits can mean only that the standard procedures could be followed.

The agency's second argument challenges petitioners to "point to a single instance in which use of the master lists resulted in the failure to award a position to an individual who would have been entitled to that job if standard reduction-in-force registers had been used." (Opp. at 6). In the Seattle remand proceedings, the administrative judge held reduction in force procedures had to be followed and therefore awarded a particular GS 12 position to Charles van Pelt in preference to Richard Putnam (Pet. App. 182a-183a). Mr. Putnam appealed to the full board, which held that the master retention list system had to be used, and reversed the denial of relief to him. *Putnam v. Dept. of Health and Human Services,* 31 M.S.P.R. 427 (1986).[4]

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4. There is pending before the board a motion for clarification filed by the agency, pointing out that "on its face the Order [in *Putnam*] appears to require the agency to pay both Putnam and Van Pelt for performing the same job." Motion for Clarification, *Putnam v. Dept. of Health and Human Services,* SE03518210127-1, Sept. 8, 1986. The board has consistently held, in cases involving other CSA appellants, that the agency must bear the risk of inconsistent decisions under similar circumstances. *Carpenter v. Dept. of Health and Human Services,* 30 M.S.P.R. 690 (1986); *Jenkins v. Dept. of Health and Human Services,* 30 M.S.P.R. 693 (1986); and *Alston v. Dept. of Health and Human Services,* 30 M.S.P.R. 697 (1986). Since presumably Messrs. Putnam and Van Pelt agree they both won their cases, neither has yet had a reason to seek judicial review.

CONCLUSION

The agency's memorandum in opposition has failed to show that the Federal Circuit decisions in these cases are anything but directly contradictory to the decisions of this Court.

Respectfully submitted,

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